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No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COMMISSION OF THE EUROPEAN COMMUNITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE COMMISSION OF THE EUROPEAN COMMUNITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

This brief is submitted on behalf of the Commission of the European Communities (the "European Commission" or the "Commission") as *amicus curiae* in support of the petition for writ of certiorari.

The European Commission is a unique institution under international law, covering subject areas ranging

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

from antitrust ("competition law") to international trade and from foreign aid to environmental protection. The Treaty establishing the European Community (the "EC Treaty") sets up an institutional system in which the Council of the European Union represents the national governments, the European Parliament is directly elected by citizens and the Commission is entrusted with a general role as "Guardian of the Treaty."[2] This "institutional triangle" is flanked by two additional institutions, the Court of Justice and the Court of Auditors.[3]

The Commission has been granted direct enforcement powers, in particular in the field of EC competition law and policy. As part of its duties, the Commission, through its services (the Directorate-General for Competition), regularly investigates the compatibility of certain behavior or proposed activities with EC competition law. The activities of the Commission services include not only reviewing proposed mergers and policing alleged industrial cartels and monopolies, but also overseeing government financial aid and formulating policies designed to aid market liberalization.

As part of its enforcement activities, the Commission operates a Leniency Program,[4] under which leniency applicants are encouraged to submit information and evidence regarding the existence of cartels, as well as other details of their involvement.

Amicus is concerned that the Ninth Circuit's opinion may interfere with the normal conduct of the Commis-

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[2] EC Treaty, art. 189, 202, 211.

[3] *Id.* art. 220, 246. A Court of First Instance is attached to the Court of Justice to hear certain matters—including competition cases—subject to a right of appeal to the Court of Justice. *Id.* art. 225.

[4] Commission Notice On The Non-Imposition Or Reduction Of Fines In Cartel Cases, *Official Journal of the European Communities* ("*OJ*") C 207, at 4 (July 18, 1996), *as amended*, Commission Notice On Immunity from Fines And Reduction Of Fines In Cartel Cases, *OJ* C 45, at 3 (Feb. 19, 2002).

sion's law enforcement mission. First, the decision may undermine its Leniency Program by permitting United States courts to order discovery of leniency applications made to the Commission—thus deterring companies from coming forward in the first place with vital information. More fundamentally, the Ninth Circuit's decision is predicated on a misunderstanding of the unique role and status of the European Commission, which, while it may in some circumstances indeed function as a "tribunal," in other circumstances acts as a law enforcement agency, detecting and investigating alleged cartels and imposing fines on cartel participants. Finally, the opinion below arguably risks interfering with the normal conduct of international cooperation between the Commission services and United States antitrust authorities.

It should be noted that the filing of this *amicus* brief in no way reflects support by the European Commission of the merits of the underlying claims made by either party to this proceeding. Rather, it reflects the European Commission's overwhelming interest in ensuring the continued proper functioning of its antitrust enforcement proceedings, unhindered by the decision of the Ninth Circuit herein at issue.

SUMMARY OF ARGUMENT

The purpose of this brief is not to expand on the legal arguments presented by the petitioner. Rather, amicus seeks to assist this Court in understanding the nature of the European Commission and the impact the Ninth Circuit's decision may have on its law enforcement mission. The Ninth Circuit based its decision below on the notion that the Commission is a "tribunal" under 28 U.S.C. § 1782. The Commission has significant law enforcement functions, however, and the court's holding that it is a "tribunal" for purposes of ordering discovery may have adverse collateral consequences for the Commission's law enforcement efforts.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION FUNDAMENTALLY MISCONSTRUES THE NATURE OF THE EUROPEAN COMMISSION.

The Ninth Circuit held that the Commission's investigation of the complaint lodged against Intel "qualifies as a 'proceeding before a tribunal' within the meaning of 28 U.S.C. § 1782." Pet. App. 7a. As a result, anyone who submits a complaint to the Commission may potentially invoke the broad discovery procedures of the United States to obtain documents and other forms of discovery "for use in" the Commission "proceeding" instituted pursuant to that complaint. 28 U.S.C. § 1782. The Ninth Circuit also held that "there is no requirement that AMD show that what is sought would be discoverable in the proceedings before the European Commission." Pet. App. 9a. Thus, United States discovery procedures would become available to persons filing complaints with the Commission, even when the Commission *itself*, exercising its discretion, does not consider it necessary to request or even subsequently to review the documents sought—as was the case here.

The Ninth Circuit's holding fundamentally misconstrues the nature of the European Commission. The Commission functions primarily as a law enforcement agency in the antitrust field. Investigation and adjudication are far more distinct under United States law than they are in the European Community, where the Commission has significant responsibilities that may partake of an adjudicatory character, and also significant law enforcement duties as well.

While the Commission's status may not fit perfectly within concepts of United States law, it is clearly vested under EC law with a law enforcement mission in many areas. Tribunals decide the merits of one party's claim against another. The Commission, in contrast, *never* adjudicates disputes between parties; it is empowered (among other things) to receive a complaint by one

party, to conduct an investigation into that party's allegation of wrongdoing, and to fine the wrongdoer if it is violating EC competition law. Thus, a principal function of the Commission is to conduct investigations, sometimes based on information or documents submitted to it in confidence. While the Commission may in this context investigate complaints, it does *not* adjudicate the rights of parties, as a tribunal would do. The parties to a complaint cannot be considered "litigants" before a "tribunal."[5] Although enjoying certain rights attached to such status, a complainant ultimately is only a person reporting an alleged violation of the law to a public authority.

Indeed, the Commission often finds itself investigating matters in conjunction with United States authorities. Like those of the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), the European Commission's inquiries often require investigation of international anti-competitive behavior. As such, the Commission has a formal cooperation agreement with the DOJ and the FTC to share information and conduct parallel investigations, and those entities have engaged in numerous coordinated investigations of international cartels. *See* Agreement Between The Government Of The United States Of America and The Commission Of The European Communities Regarding The Application Of Their Competition Laws, *Official Journal of the European Communities*, No. L 95, 47 (April 27, 1995). The 1995 EC-United States Agreement puts the Commission and the DOJ or FTC on equal footing as enforcement bodies, defining each as "competition authorities."

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[5] The Court of First Instance exercises judicial review of Commission decisions in the field of EC competition law, subject to a right of appeal to the Court of Justice on points of law.

II. THE NINTH CIRCUIT'S DECISION MAY UNDERMINE THE COMMISSION'S LAW ENFORCEMENT MISSION.

The Commission has the responsibility to ensure the enforcement of EC competition rules. For that purpose, the Commission has been granted specific investigatory powers. One of the critical functions of any law enforcement agency is to receive information from persons or companies about potentially unlawful conduct that it may investigate.

To that end, the Commission developed its Leniency Program, under which companies are encouraged to submit information regarding existing cartels of which they have knowledge in exchange for leniency from the Commission with respect to their own wrongdoing. The information companies submit is typically in the form of "Corporate Statements"—evaluative documents written exclusively for the purposes of a leniency application to the Commission, expressing a company's own description of the cartel's action and practices deriving from its own participation in the cartel. The Leniency Program has been highly successful and constitutes an important enforcement tool of the Commission.

The success of the Commission's Leniency Program depends critically on the Commission's ability to assure leniency applicants that their self-evaluative submissions remain confidential. If the Ninth Circuit's holding regarding discovery in the United States extends to leniency documents, it could have a chilling effect on the willingness of leniency applicants to come forward to the Commission. It is of paramount importance that the Commission be in a position to assure confidentiality, as law enforcement agencies all around the world must often do, and that submissions to it not become discoverable on the mistaken premise that it is primarily or exclusively a "tribunal."

The finding of the Ninth Circuit could be used in an effort to undermine the Commission's current and future

efforts before United States courts to protect the confidentiality of leniency submissions presented to the Commission. Those submissions should benefit from the same protection granted to other law enforcement agencies under the "law enforcement investigatory privilege." The Ninth Circuit's conclusion that the Commission is a "tribunal" may significantly hamper the Commission's ability to invoke that protection as the law enforcement agency it is in the antitrust area, and may expose confidential statements to full discovery processes—thereby severely undercutting the effectiveness of the Leniency Program.

This is a very serious matter. If the United States court's conclusion undermines the effectiveness of the Commission's proceedings, for example through chilling its Leniency Program and complicating the Commission's ability to assert the law enforcement privilege, this would be a breach of the principle of international comity. The Commission has already intervened in United States civil proceedings to make clear that written leniency statements made to Directorate-General for Competition should not be discoverable to civil plaintiffs. In such cases, the Commission has argued that the production of written leniency statements is a key feature of the procedure that the Commission has put in place, as a law enforcement agency, to detect and prosecute cartels and other anti-competitive practices. The Commission's ability to enforce EC competition law could be critically undermined by the discoverability of the leniency statements it has been given by leniency applicants. If United States courts were to routinely order the production of such documents, it would undermine the effectiveness of the Commission's law enforcement efforts—a breach of the principle of international comity.

The Ninth Circuit's decision may also undermine the purpose of the United States–EC Antitrust Agreement, which places the DOJ, the FTC, and the Commission on equal footing as "competition authorities" in order to

promote cooperation and coordination of their actions in the antitrust field. The European Community's effective Leniency Program assists United States authorities' efforts to prosecute international cartels, because participation in the Commission's Leniency Program may influence whether companies come forward under similar programs in the United States.

CONCLUSION

For the foregoing reasons, the European Commission respectfully urges that the petition for certiorari be granted.

Respectfully submitted,

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